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IN THE

Supreme Court of the United States

October Term, 1966

No. 1326

ROBERT LUFTIG,

Petitioner,

v.

ROBERT S. McNAMARA, as Secretary of Defense and STANLEY RESOR, as Secretary of the Army of the United States,

Repondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ROBERT S. MCNAMARA, as Secretary of Defense and STANLEY RESOR, as Secretary of the Army of the United States,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on February 6, 1967, affirming the order of the District Court dismissing the action for injunctive relief and a declaratory judgment.

The Opinions Below

The opinion of the District Court Judge is reported in 252 Fed. Supp. 819 and is printed in Appendix A hereto,

infra, p. 28. The opinion of the Circuit Court of Appeals printed in Appendix B hereto, *infra*, p. 33, is unreported.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on February 6th, 1967, p. 33, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Questions Presented

1. Whether the United States is engaged in a war in Vietnam in violation of the following treaty obligations and assurances:

(a) Kellogg-Briand Pact (Pact of Paris)

(b) Charter of the United Nations

(c) Nuremberg Judgment

(d) Geneva Agreement of 1954

(e) Southeast Asia Collective Defense Treaty (SEATO)

2. Whether the military conduct of the United States in Vietnam is a war in violation of Article 1, Section 8, Clause 11 of the Constitution.

3. Whether the President by his agents, the respondents, is violating Article II, Section 3 of the Constitution of the United States by failing to faithfully execute the law of treaty obligations.

4. The seizure and deployment of petitioner to Vietnam would violate his right of legal due process under the Fifth Amendment and the judiciary has the power to stay the Executive Branch of the Government from committing illegal acts which would subject petitioner to personal injury.

5. Whether the petitioner is subject to and bound by the following provisions of Department of the Army Field Manual, FM 27-10 (July 1956) (Chapter 8):

(a) Crimes under International Law, namely crimes against peace, crimes against humanity and war crimes (Section 11, par. 498).

(b) Individual responsibility, even though he acted pursuant to an order of a superior authority (Section IV, Par. 509).

6. Whether the United States in Vietnam is violating the Geneva Convention of 1949 to which respondents would subject petitioner.

Constitutional Provisions and Treaties Involved

A. CONSTITUTIONAL PROVISIONS:

Article I, Section 8, Clause 11

The Congress shall have Power * * *:

To declare war * * *

Article II, Section 3

* * * he [President] shall take Care that the laws be faithfully executed * * *

Article III, Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States and Treaties made, or which shall be made, under their Authority; * * *

Article VI, Clause 2

This Constitution, and the Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Fifth Amendment

No person shall be * * * deprived of the life, liberty, or property, without due process of law * * *;

B. TREATIES

(a) The Kellogg-Briand Pact

(b) The Charter of the United Nations

(c) The Nuremberg Judgment

(d) The Geneva Convention of 1949

(e) The Geneva Agreement of 1954

(f) The Southeast Asia Collective Defense Treaty.

Since the provisions of the treaties are lengthy, their pertinent texts are set forth in the Appendix (PA-C, p. 35).

Statutes Involved

1. Public Law 88-408, 78 Stat. 384 (Tonkin Bay Joint Resolution) 88 Congress 2d Session (all steps taken by the President in Southeast Asia shall be):

> Consonant with the Constitution of the United States and the charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member of protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.

2. *The Law of Land Warfare,* Department of the Army Field Manual, FM 27-10, July, 1956.

(a) *Chapter 1, Section 1, Paragraph 2:*

> The conduct of armed hostilities on land is regulated by the law of land warfare which is both written and unwritten. It is inspired by the desire to diminish the evils of war by:
>
> (a) Protecting both combatants and non-combatants from unnecessary suffering;
>
> (b) Safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and
>
> (c) Facilitating the restoration of peace.

(b) *Chapter 1, Section 1, Paragraph 7b:*

Force of Treaties Under the Constitution. Under the Constitution of the United States, treaties consitute part of the 'supreme Law of the Land' (Art. VI, Cl. 2). In consequence, treaties relating to the law of war have a force equal to that of laws enacted by the Congress. Their provisions must be observed by both military and civilian personnel with the same strict regard for both the letter and spirit of the law which is required with respect to the Constitution and statutes enacted in pursuance thereof.

(c) *Chapter 1, Section 1, Paragraph 9:*

Applicability of Law of Land Warfare in Absence of a Declaration of War

As the customary law of war applies to cases of international armed conflict and to the forcible occupation of enemy territory generally as well as to declared war in its strict sense, a declaration of war is not an essential condition of the application of this body of law. Similarly, treaties relating to "war" may become operative notwithstanding the absence of a formal declaration of war.

(d) *Chapter 8, Section II, Paragraph 498:*

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offenses in connection with war comprise:

a. Crimes against peace.

b. Crimes against humanity.

c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offenses which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offenses constituting "war crimes."

(e) *Chapter 8, Section IV, Paragraph 509(a):*

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.

(f) *Chapter 8, Section IV, Paragraph 511:*

The fact that domestic law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Statement of the Case

Petitioner has been a member of the United States Army since September 13, 1965.

On March 17, 1966, petitioner filed a complaint against Secretary of Defense Robert S. McNamara and Secretary

of the Army Stanley Resor, seeking an injunction restraining said Secretaries from deploying him to Vietnam or the immediate area to engage in the war in Vietnam and for a declaratory judgment that petitioner not be forced to engage in an illegal act by such engagement.

The complaint was dismissed *sua sponte* on a motion for a preliminary injunction. The order was filed April 15, 1966.

In his complaint petitioner alleged that he has been a member of the United States Army since induction on September 13, 1965, and is stationed at Fort Benning, Georgia. He further alleged that as a soldier he will be transferred to and assigned military duties in Vietnam or in the immediate area to aid and fight in the war in Vietnam.

Petitioner further alleged that such transfer and assignment would be an illegal seizure of and order to him to engage in a war which is violative of the laws and treaties of the United States and the Constitution of the United States. Petitioner predicated his position upon the violation by respondents of the following treaty obligations and provisions of the Constitution:

(a) Charter of the United Nations of 1945

(b) Southeast Asia Collective Defense Treaty of 1954

(c) The Geneva Agreement of 1954

(d) The Nuremberg Judgment

(e) The Kellogg-Briand Pact of 1928

(f) Constitution of the United States

1. Article II, Section 3
2. Article I, Section 8, Clause 11

Petitioner further alleged that his deployment to Vietnam for the reasons aforesaid would violate his right to due process of law under the Fifth Amendment and further compel him to engage in illegal acts.

The United States Court of Appeals for the District of Columbia Circuit affirmed the order of the lower court on February 6, 1967.

Reasons for Granting the Writ

In sustaining the judgment below, the Court of Appeals in a *Per Curiam* opinion erred as did the lower court. The affirmance was postured upon two propositions of law:

1. That the relief sought represented a claim for judicial review of political questions beyond its jurisdiction.

2. That it was an unconsented suit against the United States.

The opinion of affirmance held that the division of authority established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; that these are matters within the exclusive province of Congress and the Executive.

The opinion cited cases which are easily distinguishable but failed, as the lower court did, to mention *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U. S. 579, *Baker* v. *Carr,* 369 U. S. 186 and *Nixon* v. *Herndon,* 273 U. S. 536, which are in point and were cited extensively in all courts by petitioner.

In *Nixon* v. *Herndon, supra,* p. 540, this Court struck down the defense of "political question" where recovery was sought for private damage, saying:

> The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action, but it alleges and seeks to recover for private damage. That private damage may be caused by such political action, and may be recovered for in a suit at law, hardly has been doubted for over two hundred years, since (cases cited) and has been recognized by this court (cases cited).

Likewise in *Baker* v. *Carr, supra,* p. 209, this Court held that a defense of "foreign policy question" does not deprive the court of jurisdiction.

> Of course the mere fact that the suit seeks protection of political right does not mean it presents a political question. Such an objection "is little more than a play upon words." (citing *Nixon* v. *Herndon, supra.*

and at page 211, this Court further held:

> Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance. Our cases in this field seem invariably to show a discriminating analysis of the

> particular question posed, in terms of the history of its management by the political branches, of its susceptibility to judicial handling in the light of its nature and posture in the specific case, and of the possible consequences of judicial action. For example, though a court will not ordinarily inquire whether a treaty has been terminated, since on that question "governmental action * * * must be regarded as of controlling importance," if there has been no conclusive "governmental action" then a court can construe a treaty and may find it provides the answer.

"Recognition of belligerency abroad is an executive responsibility" this Court further held in *Baker* v. *Carr, supra,* nevertheless (p. 212)

> * * * if the executive proclamations fall short of an explicit answer a court may construe them seeking, for example, to determine whether the situation is such that statutes designed to assure American neutrality have become operative.

With the increase of the Federal power both nationally and internationally more and more situations come within the orbit of the loose definition of a "political" question. Concomitantly the courts have extended the Constitution to guard the individual and preserve his constitutionally protected rights. In 1960 Mr. Justice Douglas said in the James Madison Lecture at New York University, "But the 'political' question should no longer be used as a thicket behind which the judiciary retreats."[1]

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[1] *The Great Rights,* pp. 136, 137, edited by Edmund Cahn, The Macmillan Company, New York.

Injunctive relief is proper against an officer of the sovereign when his acts are constitutionally void and would deprive anyone of life, liberty or property without due process of law. (*Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U. S. 682 (1948), citing *U. S.* v. *Lee*, 106 U. S. 196.)

The lower courts erred in immunizing respondents on the ground that they are acting for the President. This Court has held that such immunity is non-existent when irreparable injury will be suffered unless injunctive relief is granted. In *Youngstown Sheet and Tube Co.* v. *Sawyer, supra,* this Court came to grips with this question and resolved it against the President and his agent, Secretary of Commerce Sawyer:

> The powers of the President are not as particularized as are those of Congress. But unenumerated powers do not mean undefined powers. The separation of powers built into our Constitution gives content to undefined provisions in the frame of our government.
>
> It is not a pleasant judicial duty to find that the President has exceeded his powers and still less so when his purposes were dictated by concern for the Nation's well-being, in the assured conviction that he asked to avert danger. But it would stultify one's faith in our people to entertain even a momentary fear that the patriotism and the wisdom of the President and the Congress, as well as the long view of the immediate parties in interest, will not find ready accommodation for differences on matters which, however close to their concern and however intrinsically important, are overshadowed

> by the awesome issues which confront the world. When at a moment of utmost anxiety President Washington turned to this Court for advice, and he had to be denied it as beyond the Court's competence to give, Chief Justice Jay on behalf of the Court, wrote thus to the Father of his County:
>
> We exceedingly regret every event that may cause embarrassment to your administration, but we derive consolation from the reflection that your judgment will discern what is right, and that your usual prudence, decision and firmness will surmount every obstacle to the preservation of the rights of peace, and dignity of the United States.
>
> In reaching the conclusion that conscience compels, I too derive consolation from the reflection that the President and the Congress between them will continue to safeguard the heritage which comes to them straight from George Washington.

That private rights may derive from treaties and the power of the Courts to adjudicate the decisions of the President was stated by Mr. Justice Douglas in his James Madison Lecture at New York University in 1960.[2]

> Another group concern functions specifically assigned by the Constitution to a particular department. Treaty-making authority is one example. The power to conduct foreign affairs, including the decision to recognize or not to recognize a particular regime, is another.
>
> Yet even though power is given exclusively to one department to do a certain act, when the power is

[2] See note 1, pp. 134, 135.

exercised, justiciable rights may arise. Private rights commonly derive from treaties. The Chief Executive, as Commander-in-Chief, makes decisions in which no one else can participate. But what he does often give rise to claims that courts should adjudicate.

1. International Treaties Have the Force of Law and United States War Action Is in Violation Thereof.

Article VI, Clause 2 of the Constitution in clear unequivocal language provides that Treaties are the Supreme law of the land and all judges are bound thereby. (*The Habana,* 175 U. S. 677, 700; *Missouri* v. *Holland,* 252 U. S. 416; *Hines* v. *Davidowitz,* 312 U. S. 52, 62-63; *U. S.* v. *Pink,* 315 U. S. 203, 230-231; *Clark* v. *Allen,* 331 U. S. 503-508.)

There is a duty that the Courts take judicial notice of treaties and apply their provisions to private rights. (*San Lorenzo Title and Improvement Co.* v. *Caples,* 48 SW 2d 329, 331; 134 ALR 883).

The construction and application of treaties wherever necessary are as any other laws, to be considered and determined by the courts. (*The Frances Louise,* 1 F. 2d 1004, app. dis. in *U. S.* v. *Beckman,* 270 U. S. 666.)

While great weight will be given to the construction of a treaty by the Executive Department if and when made, the question itself is judicial in its nature. (*The Sophie Rickmers,* 45 F. 2d 413.)

The United States has entered into many treaties outlawing wars:

(a) *The Kellogg-Briand Pact* (Pact of Paris)[3] (46 Stat. 2343). By this treaty the United States and France agreed that war be outlawed as an instrument of national policy. (The provisions renouncing wars are set forth in the Appendix, PA-C, p. 35.) President Hoover when he ratified the Pact with the consent of the Senate on July 24, 1929, declared that: "* * * to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

(b) The *Charter of the United Nations* (59 Stat: 1031), was originally signed by 46 nations and ratified by the Senate on July 28, 1945. It is an international treaty and commands the respect of the principles of international law.[4] *Chapter 1, Art. 2 (4)* directs that all members shall refrain from the use of force against the territorial integrity or political independence of any state inconsistent with the purpose of the United Nations; and *Chap. VII, Art. 39,* provides that the Security Council shall determine what measures shall be taken to maintain or restore peace

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[3] "Being permanent in its nature and purpose and representing a fundamental change in the legal structure of international society, the Pact of Paris must be regarded as continuing in being and as one of the corner-stones of the international legal systems." L. Oppenheim and H. Lauterpacht, p. 197.

[4] Ambassador Arthur J. Goldberg, former Associate Justice of the Supreme Court of the United States, quoted in an article in *The New York Times,* February 6, 1966: "Sometimes, just because the United Nations is such a great concept, we forget that the Charter is also a legal document, a treaty, and we're bound by it—we have treaty obligations."

and security. (The provisions are set forth in the Appendix, PA-C, p. 35.)

Unilateral action by any member without the sanction of the United Nations has been condemned.[5]

(c) *Nuremberg Judgment.* On December 11, 1946, the General Assembly of the United Nations adopted a resolution (Gen. Ass. Res. (1)(95) reaffirming the principles of the Nuremberg Judgment and the provisions of the International Military Tribunal.[6] Under the definition in *Article 6(a),* the waging of the war by the United States in Vietnam is in violation of international treaties, agreements or assurances[7] and an international crime. (The provisions are set forth in the Appendix, PA-C, p. 35.)

The same principles of the Nuremberg Judgment governing crimes under international law were adopted by the Department of the Army July 13, 1956, and contained in the Field Manual FM 27-10, page 178[8].

(d) The *Geneva Agreement* of 1954 recognized Vietnam as a single state[9] and therefore the armed conflict that thereafter started in Vietnam was a civil war.[10] (67 Corpus

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[5] The Sinai Peninsula incident in 1956.

[6] Parties to International Military Tribunal were the United States, Republic of France, United Kingdom and Union of Soviet Socialist Republics.

[7] See assurance given by United States in connection with Geneva Agreement of 1954 in the Appendix, PA-C, p. 42.

[8] *Supra,* p. 6.

[9] Appendix, PA-C, p. 41.

[10] *A Modern Law of Nations,* pp. 165-166, by Prof. Philip C. Jessup; *57 American Society of International Law Proceedings,* p. 152, by Prof. Louis Henkin; *Moore's Digest of International Law,* Vol. 2, page 412.

Juris 336, 347 and note 16; Black's Dictionary, 2d ed., p. 1217.)

Although the United States did not sign the Agreement, a declaration was issued in which it announced its assurance that it would refrain from the use of force to disturb the terms of the Geneva Agreement and abide by Article 2(4) of the Charter of the United Nations.

(e) *The Southeast Asia Collective Defense Treaty* (SEATO)[11] is no legal support for the fighting presence of the United States in Vietnam. The members of SEATO never voted for such action and if it had, prior approval by the Security Council of the United Nations would have been necessary under *Chapter VIII, Article 53.* (The provisions are set forth in the Appendix, PA-C, p. 43.)

Nor can the action of the United States in Vietnam be legally justified under the Treaty since *Article 4* thereof states that a member may "act to meet the common danger in accordance with its constitutional processes."

2. The Military Conduct of the United States in Vietnam Without a Declaration of War by Congress Violates Article 1, Section 8, Clause 11 of the Constitution.

Without any declaration of war by Congress the United States is engaged in an extensive war campaign in Vietnam.

(a) United States troop commitments in Vietnam number about 450,000.

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[11] Created September 8, 1954, nineteen days after the Geneva Agreement, by Australia, France, New Zealand, Pakistan, Philippines, Thailand, United Kingdom and United States.

(b) United States casualties in Vietnam were reported on April 1, 1967, as 8,754 killed, 1,534 non-combatant deaths, 51,601 wounded and 501 missing.

(c) The United States has established military bases in South Vietnam, Thailand and Guam.

(d) All four branches of our military are involved in Vietnam, the Army, Navy, Marine Corps and Air Force.

(e) United States forces have been engaged in actual combat in Vietnam since January 1, 1961.

(f) The United States has conducted air strikes and ground fighting and the use of chemical warfare against military personnel, installations and the civilian population.

(g) The United States is in joint, if not sole, command of the military forces in South Vietnam.

(h) A "Cold War G. I. Bill of Rights" for those who served in the armed forces between January 31, 1955 and July 1, 1967 is in effect.

(i) Appropriations of over $12.4 billion has been made for the conduct of the war.

As long ago as 1886, the Court in *Ex Parte Milligan*, 4 Wall 2, held that under the separation of powers, the President cannot intrude upon Congress' war power.

The United States war action in Vietnam violates international law. (*An Introduction to International Law*, p. 61, by J. G. Starke.)

The Constitution vests in Congress alone the power "to declare war," *Article I, Section 8; Clause 11.* But a declaration by the President of an emergency and his assumption of powers as wartime Commander-in-Chief of the Army and Navy, is the equivalent of a declaration by the President of a state of war. The actions taken under such conditions are justiciable.[12]

3. It Is the Duty of the Respondents to Take Care That the Laws Be Faithfully Executed.

Article 11, Section 3 of the Constitution imposes the duty upon the President of the United States to see that laws are faithfully executed. This does not mean some laws or only those selected, but all the laws of the land. Under *Article VI Clause 2,* these include treaties made with other nations, including the Charter of the United Nations.

By the language of this Constitutional duty of the President, the subordinates to whom such "care" is entrusted bear the same responsibility and in this instance, the respondents.

The general rule, as stated by the Court, is that when any duty is cast by law upon the President, it may be

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[12] *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579;
Little v. *Barreme,* 2 Cranch 170;
Ex Parte Milligan, 4 Wall 2;
Mitchell v. *Harmony,* 13 How. 115;
Duncan v. *Kahanamoka,* 327 U. S. 304;
Sterling v. *Constantin,* 287 U. S. 378;
The Orano (CC), 1 Gall 137, F. Cas. No. 10585.
Galston v. *Hoyt,* 3 Wheat 246;
Filbin Corp. v. *United States* (DC SC), 266 F. 911;
Ex Parte Merryman (CC), Taney 246, F. Cas. No. 9487.

exercised by him through the head of the appropriate department, whose acts become the President's acts.[13]

This action for injunctive relief to prevent the seizure and deployment of petitioner to engage in an illegal act (the war) is not an action against the United States, but a challenge to respondents' authority and the abuse of their powers. (*Philadelphia* v. *Stimson*, 223 U. S. 605, 620.)

4. The Seizure and Deployment of Petitioner to Vietnam Would Violate His Right of Legal Due Process Under the Fifth Amendment.

The petitioner's personal rights should be equal to if not greater than property rights. The respondents cannot seize and enlist petitioner to engage in an illegal war any more than they can seize private property without lawful authority.

The legal right of petitioner to the injunctive relief sought herein is supported by *Youngstown Sheet and Tube Co.* v. *Sawyer, supra.* In this case the Court struck down the power of the President to seize steel plants under an executive order. This Executive Order was made in the face of a possible steel strike during the Korean conflict and on the mistaken legal assumption that the President had this power as the Nation's Chief Execu-

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[13] *Wilcox* v. *McConnell*, 13 Pet. 498, 513 (1839);
United States v. *Eliason*, 16 Pet. 291 (1842);
Williams v. *United States*, 1 How. 290, 297 (1843);
United States v. *Jones*, 18 How. 92, 95 (1865);
The Confiscation Cases, 20 Wall 92 (1874);
United States v. *Farden*, 99 U. S. 10 (1879);
Wolsey v. *Chapman*, 101 U. S. 755 (1880);
In re Neagle, 135 U. S. 1 (1890).

tive and the Commander-in-Chief of the Armed Forces of the United States.

In *Youngstown, supra,* this Court held that the seizure order could not be sustained " * * * as an exercise of the President's military power as Commander in Chief of the Armed Forces * * * Now can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President."

Mr. Justice Jackson, in a concurring opinion, in *Youngstown* v. *Sawyer, supra* (p. 633), thought that the seizure would give to the President not only the power to execute the laws under Article 2 of the Constitution, but to make some. Writing of the President's power, he said (p. 646): "What the power of command may include, I do not try to envision, but I think it is not a military prerogative, without support of law, to seize persons or property because they are important or even essential for the military and naval establishment."

The seizure of petitioner by respondents, not less than the seizure of the steel plants, is protected by due process of law under the Fifth Amendment *(Youngstown* v. *Sawyer, supra).* The summary violation by respondents of lawful mandates and constitutional restrictions imposed upon them, to the injury of petitioner, constitutes a violation of petitioner's right of due process of law.

The existence of a state of war does not suspend or change the operation of the guarantees and limitations of the Fifth Amendment conferred upon citizens by the Constitution. (*United States* v. *Cohen Grocery Co.,* 255 U. S. 81.)

The legal power of the respondents to ship petitioner to Vietnam rests upon weaker grounds than the government's seizure of the steel plants in *Youngstown* v. *Sawyer, supra.* There the government failed to sustain its position even in the light of the Korean conflict, a United Nations action. In Vietnam there has been no such approval by the United Nations. The violation of our treaty obligations is clearly and unequivocally in contravention of our Constitution.

5. United States Action in Vietnam Violates the Laws of Land Warfare and Petitioner's Participation Would Make Him Guilty Under International Law.

The character of the conduct of the United States in Vietnam raises serious questions concerning violations of the laws of land warfare.

The signators to the Geneva Convention of 1949 regulating the treatment of prisoners and the wounded and sick, and the protection of civilians, include virtually all the nations of the world. The United States has also signed and ratified the earlier Hague Conventions dealing with some of the same subjects. The Department of the Army Field Manual, FM 27-10 specifically observes that treaties constitute the "supreme law of the land", their provisions "must be observed by both military and civilian personnel" (the provisions are set forth on p. 5, *supra*).

The Law of Land Warfare, FM 27-10, Chapter 1, Section 1, Paragraph 2, sets forth what are specific acts constituting violations of Laws of War. (The provisions are set forth on p. 5, *supra.*)

6. Treatment of Prisoners.

The United States active participation in the war has made it a party to the torture of prisoners and acquiessence by others committed in the presence of U. S. military personnel. Professor Greenspan in his treatise *The Modern Law of Land Warfare* states the law: "In accordance with the general principles of criminal law regarding complicity, the accomplice is accountable for crimes committed in furtherance of the common purpose, even though he himself did not commit the actual crimes" (469). The Dachau Concentration Camp Trial (Trial of Weiss, et al.) (1945) U. S. Gen. Mil. Govmt. Ct., L. R. T. W. C., XI, 12-16 is authority for the proposition that where "a common design to violate the laws and usages of war is established, everybody taking part in the common design is guilty of war crime, though the nature and extent of the participation may vary" (469).

Under Article 17 of the Geneva Convention on Prisoners, a prisoner of war need only give his name, rank, date of birth and serial number and that "no physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever."

Eyewitness reports include the following instances of torture of Viet Cong prisoners: "bamboo slivers run under their fingernails or wires from field telephone connected to arms, nipples, or testicles" (Newsweek correspondent William Touhy, New York Magazine, Nov. 28, 1965); dunking men head first into water tanks or slicing them up with knives" (Chief correspondent, London Sun-

day Mirror, Donald Wise, April 4, 1965) "the 'ding-a-ling' method of interrogation involves connection of electrodes from this [U. S. field] generator to the temples of the subject * * * in case of women prisoners * * * to the nipples" (Malcolm Browne, Pulitzer Prize winning A. P. reporter in *The New Face of War;* "cutting off the fingers, ears, fingernails or sexual organs * * * One American installation has a Viet Cong ear preserved in alcohol" (Beverly Deepe, Herald Tribune Saigon correspondent, April 25, 1965); "they get a Viet Cong and make him hold out his hands against his cheeks, then they take this wire and run it right through the one hand and right through his cheek and into his mouth. * * * Oh you ought to see how quiet them gooks sit in a helicopter when we got them wrapped up like that" a young U. S. Marine quoted by Jimmy Breslin, New York Herald Tribune correspondent, September 29, 1965.

Article 12 of the Geneva Convention on Prisoners requires a country to guarantee the treatment of prisoners it turns over to others.

Even before the Geneva Convention of 1949, United States war crimes tribunals had ruled that torture and killing of prisoners of war is a war crime. Trial of Yoshio Makizawa (1946) U. S. Mil. Commission, Shanghai, L. R. T. W. C. XV, 101; releasing prisoners to the custody of others where they are likely to be killed was held to be a crime in *The Jaluit Atol Case* (Trial of Aeuberger) (1946) Br. Mil. Ct. Germany, *ibid.*, 81.

In the case of *In re Yamishita,* 327 U. S. 1 (1946), the United States Supreme Court held that Yamishita had

violated the laws of war by failing to control his troops from committing brutalities against prisoners and civilians.

Article 13 of the Geneva Convention on Prisoners of War states that "measures of reprisal against prisoners of war are prohibited."

The continued bombings of North Vietnam by the U. S. causing death of civilians and non-military objects are the acts to destroy persons and property protected by the laws of the United States through our treaty obligations. The *Belsen* Trial (Trial of Kramer, et al.) established the rule that "a systematic course of conduct" was sufficient to prove intent.

The Charter of the United Nations makes illegal the threat or use of force contrary to the purpose of the United Nations—however, a non-member nation or a member nation which violates these provisions of the Charter commits a further breach of international law by commencing hostilities without a declaration of war or a conditional ultimatum as required by the foregoing articles of Hague Convention No. 111. Conversely, a state which resorts to war in violation of the Charter will not render its acts of aggression or breach of the peace any the less unlawful by formally declaring war.

Conclusion

Should the petitioner act in obedience to the order of his superior to engage in the war in Vietnam, and thereby commit crimes of International Law, he could not interpose such order as a defense. Such obedience would

place him in the dangerous, but paradoxical, situation of being court-martialed for disobedience of the order and convicted under International Law for obeying it.[14]

That unless an injunction is granted petitioner could very well suffer the same consequences that befell the three soldiers, Dennis Mora, James Johnson and David Samas, who, upon refusing to go to Vietnam, were court-martialed at Fort Dix, New Jersey, on September 6-9, 1966, and received sentences of three years, five years and five years, respectively. These convicted soldiers also sought comparable relief in the United States District Court for the District of Columbia prior to their courts-martial, but it was denied. The denial was affirmed by the United States Court of Appeals for the District of Columbia Circuit on February 6, 1967, on the same grounds that the Court of Appeals affirmed in the case now before this Court.

Wherefore, it is respectfully prayed that a writ of certionari be granted to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

STANLEY FAULKNER,
SELMA W. SAMOLS,
Attorneys for Petitioner.

Dated: April 24, 1967.

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[14] *Dicey's Law of the Constitution* (9th Ed. 1939, p. 302).

Certificate of Service

I HEREBY CERTIFY that I have this day served the within document upon all parties of record in this proceeding by mailing via first class mail, postage prepaid, a copy to each party. I further certify that I have this day mailed to the United States Attorney for the District of Columbia, the Attorney General of the United States and the Solicitor General of the United States copies of this document.

Dated: New York, N. Y.
April 25, 1967

STANLEY FAULKNER

APPENDIX A

Opinion of the District Court

April 5, 1966

[2] The Court: This is an action by a member of the United States Army against the Secretary of Defense and the Secretary of the Army to enjoin them from ordering the plaintiff to proceed to Viet Nam or in the immediate area to engage in the war in Viet Nam. Before the Court now is a motion for a preliminary injunction.

Basically the underlying question is whether the Courts have any power to enjoin the Commander in Chief of the Army and Navy of the United States against either carrying on a war or hostilities of other types or, specifically, against transferring or stationing a member of the Armed Forces in some particular area. The Court is of the opinion that this is obviously a political question that is outside of the judicial function.

There are a number of cases to which the Court might refer without endeavoring to exhaust all of them. In State of Mississippi v. Johnson, 4 Wallace 475, there was an action brought in behalf of the State of Mississippi against President Andrew Jackson to enjoin him from stationing certain troops in the State of Mississippi for the purpose of carrying out what have become known in history as the Reconstruction Statutes. The Supreme Court held that the action could not be maintained. At page 500 the Chief Justice made the following observation:

> "The Congress is the legislative department of the Government. The President is the Executive Department. Neither can be restrained in its action by the Judicial Department, though the acts

> of both when performed are, in proper cases, subject to its cognizance. The impropriety of such interference will be clearly seen upon consideration of its possible consequences. Suppose the bill filed and the injunction prayed for allowed. If the President refused obedience, it is needless to observe that the Court is without power to enforce the process."

A companion case dating back to he same era is State of Georgia against Stanton, 6 Wallace 50, in which a somewhat similar injunction was sought against Secretary of War Stanton by the State of Georgia, with the same result. At page 71 the Court stated:

> "The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country that we [4] need do no more than refer to some of the authorities on the subject. They are all in one direction."

If we now pass on to our town times, the decision of the Court of Appeals for this Circuit in Pauling v. McNamara, 118 Appeals D.C. 50, is pertinent. That case involved an action of a cltizen against the Secretary of Defense to restrain and enjoin him, as well as the members of the Atomic Energy Commission, from carrying on certain experiments with nuclear weapons.

The Court of Appeals held that such an action was outside of the judicial power. At page 52 Judge Burger of the Court of Appeals wrote as follows:

> "Decisions in the large matters of basic national policy, as are foreign policy, present no

judicially cognizable issues and hence the Courts are not empowered to decide them."

In another connection this Court had occasion to discuss the tripartite division of Government of the United States in Trimble v. Johnson, 173 Fed. Supp. 651. In that case this Court stated:

> "It is no part of the judicial function to supervise or control the business of the Executive or Legislative Departments of the Government. [5] Otherwise the Judiciary, instead of being one of the three coordinate branches, would be supreme over the other two. We would then have a government by the Courts instead of by the Congress and the President. Manifestly, the Founding Fathers did not contemplate such a result."

This aspect of the discussion might be concluded by reference to the classic words of Mr. Justice Stone in United States v. Butler, 297 U.S. 78. Mr. Justice Stone observed eloquently:

> "While unconstitutional exercise of power by the Executive and Legislative Branches of the Government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint."

To be sure, these remarks are taken from a dissenting opinion, but they reiterate a doctrine the soundness of which no one would dispute.

Thus the Court concludes that the question involved is a political one and therefore not cognizable by the Judiciary.

But there are other grounds which lead the Court to the same result. The Courts may not substitute themselves for the Commander in Chief of the Army and Navy and determine [6] the disposition of members of the Armed Forces. In Johnson v. Eisentrager, 339 U.S. 763, at 789 it was said by Mr. Justice Jackson in the majority opinion:

> "Certainly it is not the function of the Judiciary to entertain private litigation, even by a citizen, which challenges the legality, the wisdom or the propriety of the Commander in Chief in sending our Armed Forces abroad or to any particular region."

In Beard v. Stahr, 200 Fed. Supp. 766, a decision by a Three Judge Court, which involved a motion for a preliminary injunction to restrain the Secretary of the Army from separating an officer of the Armed Forces from the Service, it was stated at page 773:

> "Armies cannot be maintained and commanded and wars cannot be won by the judicial process. Supervision and control over the selection, appointment and dismissal of officers are not judicial functions."

The same principle applies to deployment of members of the Armed Forces.

To be sure, the decision in that case resulted in the judgment being vacated by the Supreme Court merely on the ground that the complaint was premature. The Supreme [7] Court did not pass upon the merits of the decision. 370 U.S. 41.

Finally, the Court is of the opinion that this case is barred by the very basic and fundamental principle that

although ostensibly and in name it is a suit against officers of the government, it is actually and in essence a suit against the United States. The government has not consented to be sued in this matter for an injunction and therefore, for this reason too, the action may not be maintained.

In view of these considerations the motion for a preliminary injunction is denied.

A transcript of this oral decision will constitute the findings of fact and conclusions of law. Counsel may submit an appropriate order.

Mr. Hannon: Does Your Honor sua sponte, under the circumstances, dismiss the case? In view of Your Honor's opinion does the Court sua sponte dismiss this action for lack of jurisdiction?

The Court: There is no motion before me to dismiss it.

Mr. Hannon: If Your Honor please, the Government's opposition to the motion for a preliminary injunction was [8] based solely upon the fact that there is no jurisdiction.

The Court: The Court will dismiss this action sua sponte for lack of jurisdiction over the subject matter.

Mr. Hannon: Thank you, Your Honor.

APPENDIX B

Opinion of the United States Court of Appeals for the District of Columbia Circuit

PER CURIAM: This is an appeal from dismissal of a suit for declaratory judgment and injunctive relief brought by Appellant, a private in the Army of the United States, to enjoin the Secretary of Defense and the Secretary of the Army from sending him to Viet Nam. He claims that American military action in Viet Nam is unconstitutional and illegal and that Appellees have no lawful authority to assign him there.[1] Appellant does not challenge the legality of his induction and does not seek release from military duty.

The complaint is entitled in terms of a suit against individual officials of the United States government; in legal effect it is plainly a suit against the United States acting through these officials.

The District Court *sua sponte* ordered dismissal of the complaint on the ground that the relief sought represented a claim for judicial review of political questions beyond its jurisdiction and that it was an unconsented suit against the United States.

The District Court was, of course, eminently correct on both its primary and alternative grounds for dismissal; these propositions are so clear that no discussion or citation of authority is needed. The only purpose to be accomplished by saying this much on the subject is to make it clear to others comparably situated and similarly inclined

[1] This is Appellant's second attempt to have a Federal court hold the war illegal. His prior suit was dismissed, Luftig v. Ferguson, No. 44700, N.D.Cal., Feb. 18, 1966.

that resort to the courts is futile, in addition to being wasteful of judicial time, for which there are urgent legitimate demands.

It is difficult to think of an area less suited for judicial action than that into which Appellant would have us intrude. The fundamental division of authority and power established by the Constitution precludes judges from overseeing the conduct of foreign policy or the use and disposition of military power; these matters are plainly the exclusive province of Congress and the Executive. *Johnson* v. *Eisentrager,* 339 U.S. 763, 789 (1950); *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S.Corp.,* 333 U.S. 103, 111 (1948); *Eminente* v. *Johnson,* —— U.S.App. D.C. ——, 361 F.2d 73, *cert. denied,* 385 U.S. 929 (1966); *Pauling* v. *McNamara,* 118 U.S.App.D.C. 50, 331 F.2d 796 (1963), *cert. denied,* 377 U.S. 933 (1964); *Pauling* v. *McElroy,* 107 U.S.App.D.C. 372, 278 F.2d 252, *cert. denied,* 364 U.S. 835 (1960).

Affirmed.

APPENDIX C

Treaties

1. *Kellogg-Briand Pact* (46 Stat. 2343).

Article 1:

> The High Contracting Parties solemnly declare in the names of the respective peoples that they condemn recourse to war for the solution of international controversies and renounced it as an instrument of national policy in their relations with one another.

2. *The Charter of the United Nations* (59 Stat. 1031).

Chapter 1, Article 2(4):

> All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purpose of the United Nations.

Chapter VII, Article 39:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations or shall decide what measures shall be taken * * * to maintain or restore international peace and security.

3. *The Nuremberg Judgment.* International Military Tribunal and the Charter of the Tribunal (59 Stat. 1544).

II. **Jurisdiction and general principles**

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial

and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) War Crimes; namely, violations of the laws and customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) Crimes Agaln Humanity; namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crimes

within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or consiparcy to commit any of the foregoing crimes are responsible for all acts, performed by any persons in execution of such plan.

Article 7. The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Control Council Law No. 10

On December 20, 1945, the four occupying powers of Germany, acting through the four Zone Commanders, promulgated Control Council Law No. 10 in order

"* * * to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than

those dealt with by the International Military Tribunal * * * (Official Gazette of the Control Council for Germany, Number 3, 31 January 1946, Berlin: Allied Secretariat, pp. 50-55)."

Law No. 10 was adopted from the London Charter with certain differences, one of which was that the definition of "crimes against peace," in other respects the same as the Nuremberg Charter, included "invasions" as well as "wars" (thus furnishing a basis for charging the Austrian and Czechoslovakian conquests as crimes against peace).

Article II, Sec. 2 of Law No. 10, provided for individual responsibility for the crimes defined in Section 1 as follows:

2. Any person, without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he

a) was a principal or

b) was an accessory to the commission of any such crime or ordered or abetted the same or

c) took a consenting part therein or

d) was connected with plans or enterprises involving its commission or

e) was a member of any organization or group connected with the commission of any such crime or

f) with reference to paragraph 1a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in

the financial, industrial or economic life of any such country."

Charter of the International Military Tribunal for the Far East, January 19, 1946.

The Charter was approved by the Supreme Commander for the Allied Powers January 19, 1946; it was amended by order of the Supreme Commander, General Headquarters, OPA 500, April 26, 1946. (Treaties and Other International Act Series 1589; Dept. of State Publication 2613; A decade of American Foreign Policy, 1941-1949, Senate Document 123, 81st Cong., 1st Session, p. 961.)

The Charter provides in pertinent part:

II. **Jurisdiction and general provisions**

Article 5. Jurisdiction Over Persons and Offenses.

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) **Crimes Against Peace:** Namely, the planning, preparation, initiating or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) **Conventional War Crimes**: Namely, violations of the laws or customs of war;

(c) **Crimes Against Humanity**: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, * * * whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation of execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

Affirmation of the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal.

On motion of the United States the first session of the General Assembly of the United Nations unanimously adopted a resolution affirming the principles of international law recognized by the Charter and Judgment of the Nuremberg Tribunal. [Res. 95 (I), adopted 11 December,

1946; The United States and the United Nations: Report by the President to the Congress for the year 1946, Dept. of State Pub. 2735, pp. 129-130; a Decade of American Foreign Policy, 1941-49, p. 965.]

4. *Geneva Convention of 1949.*

Article 12:

> Prisoners of war are in the hands of the enemy power, but not of the individuals or military units who have captured them. Irrespective of the individuals' responsibilities that may exist, the Detaining Power is responsible for the treatment given them.

Article 17:

> No physical or mental torture nor any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

5. *The Geneva Agreement of 1954.* (Final Declaration)

(6)

> The Conference recognizes that the essential purpose of the agreement relating to Vietnam is to settle military questions with a view to ending hostilities and that the military demarcation line is provisional and shall not in any way be interpreted as constituting a political or territorial boundary. * * *

Appendix C

(7)

The Conference declares that, so far as Vietnam is concerned, the settlement of political problems effected on the basis of respect for the principles of independence, unity and territorial integrity, shall permit the Vietnamese people to enjoy the fundamental freedoms, guaranteed by democratic institutions established as a result of free general elections by secret ballot. In order to ensure that sufficient progress in the restoration of peace has been made, and that all the necessary conditions obtain for free expression of the national will, general elections shall be held in July, 1956, under the supervision of an International Commission. * * *

Declaration of the United States:

* * * [R]efrain from threat or the use of force to disturb them, in accordance with Article 2(4) of the Charter of the United Nations dealing with the obligations of members to refrain in their international relations from the threat or use or force * * * (Extract from Verbatim Records of Eighth Plenary Session).

6. *The Southeast Asia Collective Defense Treaty* (SEATO).

Preamble and Article 1:

In the event of a conflict between the obligations of the members of the United Nations under the present Charter and their obligations under any

other International Agreement, their obligations under the present Charter shall prevail.

Chapter VIII, Article 53:

(1) The Security Council shall where appropriate utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against an enemy state, as defined in para. 2 of this Article. (enemy state applies to an enemy of any present Charter member during World War II).

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1326

ROBERT LUFTIG, PETITIONER

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE, AND STANLEY RESOR, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner is a soldier lawfully inducted into the United States Army and stationed at Fort Benning, Georgia. Alleging that United States military action in Vietnam is illegal because Congress has not formally declared war and because such action (in his view) violates certain treaties and international agreements, petitioner sued to enjoin the Secretary of Defense and the Secretary of the Army from trans-

ferring him to Vietnam and to declare the American military activity there illegal. The district court dismissed the suit. *Luftig* v. *McNamara*, 252 F. Supp. 819 (D. D.C.) (Pet. App. 28).[1] The court of appeals affirmed, agreeing with the district court that the suit was "a claim for judicial review of political questions beyond its jurisdiction and that it was an unconsented suit against the United States." 373 F.2d 664 (Pet. App. 33).[2] This decision is plainly correct, and there is no occasion for further review.

1. This is an unconsented suit against the United States. Although petitioner purports to sue respondents in their private capacities, the relief he seeks would prevent the Secretary of Defense and the Secretary of the Army from exercising their judgment regarding the most effective deployment of a member of the United States Army.[3] Thus, "the effect

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[1] This was petitioner's second suit to obtain a federal court order against his transfer to Vietnam. His previous action, raising the identical contentions, was dismissed by the United States District Court for the Northern District of California on February 18, 1966, as "moot and upon the further ground that this court lacks jurisdiction of the subject matter to stay any movement of [petitioner] pursuant to military orders." *Luftig* v. *Ferguson, Commanding Officer, Fort Ord, et al.*, No. 44,700 (Pet. App. 33). Petitioner did not appeal.

[2] Petitioner's requests for injunctive relief precluding his transfer to Viet-Nam *pendente lite* were denied by the court of appeals on April 29, 1966 (J.A. 13), and by the Chief Justice on May 26, 1966 (J.A. 13-14).

[3] Petitioner has never challenged the lawfulness of his induction into military service and does not seek release from the Army before the normal expiration of his term of service.

of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan* v. *Rank*, 372 U.S. 609, 620; *Hawaii* v. *Gordon*, 373 U.S. 57, 58; *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 704. And the conduct complained of by petitioner is within the authority vested by the Constitution in the Executive.

The President possesses "in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs" (*Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 109), and his "very delicate, plenary and exclusive power" in the field of foreign relations "does not require as a basis for its exercise an act of Congress * * *" (*United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320). This authority extends to military activity. This Court has long held that "hostilities may subsist between two nations" without a declaration of war (*The Eliza*, 4 Dall. 37, 40)[4] and that authority to direct such hostilities is implicitly granted the President by the Constitution (see *In re Neagle*, 135 U.S. 1, 64). The "Executive has used force abroad at least a hundred times to accomplish national purposes without reference to Congress." Rogers, *World Policing and the Constitution* (1945), p. 56; see H. Rep. No. 127, 82d Cong., 1st Sess., pp. 55-62; H. Doc. No. 443, 84th Cong., 2d Sess. At all events Congress has

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[4] See, also, *Durand* v. *Hollins*, 8 Fed. Cases 111 (C.C.S.D. N.Y.) (Mr. Justice Nelson); H. Rep. No. 127, 82d Cong., 1st Sess., p. 20.

approved the action taken under the independent authority of the President in Vietnam, both expressly (in the "Gulf of Tonkin Resolution," 78 Stat. 384) and by appropriating funds to support it (Pub. L. 89-18, 79 Stat. 109; Pub. L. 89-367, 80 Stat. 36). Nor is the Vietnam activity in violation of our treaty obligations. See Meeker, *The Legality of United States Participation in the Defense of Viet-Nam*, Department of State Bulletin, March 28, 1966.

2. Since this suit asks judicial intervention in the conduct of foreign policy, the courts below properly held that it presents a non-justiciable political question. This is not a case that merely "touches foreign relations" (*Baker* v. *Carr*, 369 U.S. 186, 211); it involves a direct challenge to the wisdom of the Executive's decision as to how our foreign relations should be conducted. Clearly, "recognition of belligerency abroad is an executive responsibility." *Id.* at 212. As this Court said in *Johnson* v. *Eisentrager*, 339 U.S. 763, 789:[5]

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * * The issue tendered * * * involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible.

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[5] See, also, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111; *Baker* v. *Carr*, *supra*, at 217; *Marbury* v. *Madison*, 1 Cranch 137, 166; *Eminente* v. *Johnson*, 361 F.2d 73 (C.A.D.C.), certiorari denied, 385 U.S. 929.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

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